

The matter becomes more complicated as claimant was terminated on October 28, 2003, after being accused of using obscene language toward Mr. Schuldt and John

Larson, the vice president of operations, during an argument about claimant's attendance problems. Claimant, Mr. Larson and Mr. Schuldt had a meeting the day before, on October 27, 2003, regarding the fact that claimant had numerous attendance violations on his time record.

Early on the morning of October 28, claimant approached Mr. Schuldt requesting he be allowed to use certain vacation days for medical appointments. Mr. Schuldt discussed the matter with Mr. Larson and, after that conversation, advised claimant that Mr. Larson would prefer that claimant schedule the doctor appointments after his shift ended at 3:30 p.m., if possible. Witnesses to the event indicated that claimant became angry at that time and according to Mr. Schuldt and a coworker, David Little, claimant called Mr. Schuldt and Mr. Larson "fucking pricks." Claimant later alleged that he did not say that, but instead simply said that working in this place was the "fucking pits." As a result of that altercation, claimant's employment with respondent was terminated.

Mr. Schuldt testified that claimant at no time advised him of any injury occurring on October 28, 2003. Mr. Schuldt testified that had claimant mentioned any type of work-related injury, he would have immediately advised claimant to fill out an accident report. This was not done. Mr. Little, who observed the conversation wherein the vulgarity was used, testified that claimant then threw a lot of nuts and bolts around his work station, stating there could have been hundreds or even thousands of dollars worth of material to sort out afterwards.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹

In this instance, claimant alleges an injury on October 28, 2003, while lifting a heavy track rail. Respondent's representatives deny being advised of any such injury, but instead describe a verbal altercation between claimant and his supervisors, which led to claimant's termination. Here, claimant, Mr. Schuldt and Mr. Larson all testified before the Administrative Law Judge. The Administrative Law Judge thus had the opportunity to observe the three witnesses and assess their credibility. The Board has held on past occasions that an administrative law judge's ability to observe witnesses in live testimony does allow for some credence to be paid to the judge's ability to assess the credibility of those witnesses. Whether claimant suffered accidental injury arising out of and in the course of his employment on the date alleged stems to a great deal on witness credibility. The Board finds that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment.

¹ K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge John D. Clark dated December 23, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2004.

BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
 Roger E. McClellan, Attorney for Respondent
 John D. Clark, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director